

Oregon Steel Mills, Inc. and United Steelworkers of America, AFL-CIO and Dennis Sousa, Attorney for Charging Parties.¹ Cases 36-CA-5844, 36-CA-5940, 36-CA-5968, and 36-CA-5945

November 30, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On July 6, 1989, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a request for oral argument.² The Charging Parties and the General Counsel filed answering briefs to the Respondent's exceptions. The General Counsel filed a cross-exception to the judge's decision and a motion to strike portions of the Respondent's brief.³ The Respondent filed an answering brief in response to the General Counsel's cross-exception.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,⁴ findings,⁵ and conclusions and to adopt the recommended Order.

¹Representing four individual Charging Parties: Richard Adams, Marlynn Hunt, John Maxwell, and David Vasil.

²The Respondent's motion for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

³The General Counsel moves that Apps. A through F of the Respondent's brief be stricken. App. A was rejected as an exhibit by the administrative law judge at the hearing. Apps. B through F were never offered as evidence at the hearing before the judge and no showing has been made under the Board's Rules and Regulations, Sec. 102.48(a)(1), that the appendices should now be admitted. We grant the motion to strike.

⁴In adopting the judge's determination that the General Counsel is not barred by Sec. 10(b) of the Act from challenging the Respondent's screening procedures, we do not rely on the judge's finding that the relevant date is the date the employee's preferential recall rights were affected. *Vitronic Division of Penn Corp.*, 239 NLRB 45 (1978). We also do not rely on the judge's finding that there was no showing that the Union knew of the Respondent's screening procedures more than 6 months prior to the filing of the first charge. Because the Union was decertified, notice to it is immaterial. Rather we find that the relevant date for 10(b) purposes is the date the employees learned that their decision not to participate in the Respondent's screening procedures would affect their employment. As stated in *Teamsters Local 42 (Daly Co.)*, 281 NLRB 974 (1986), enfd. 825 F.2d 608, 615 at fn. 6 (1st Cir. 1987), "a final adverse employment decision must be communicated to affected employees in order to trigger the limitations period." In this case we find the adverse employment decision was not communicated to employees Cox and Morris until April 1988, well within the 10(b) period of the June 1988 charge.

⁵The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent violated Sec. 8(a)(3) by its use of contract and temporary labor. The Respondent failed to offer a substantial business justification to rebut the General Counsel's prima facie case.

In adopting the judge's finding that employee Maxwell's job at Precision Cast Parts was not comparable to his prestrike job with the Respondent, we

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Oregon Steel Mills, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

do not rely on the judge's assumption that the Respondent would have been more tolerant of Maxwell's depression-induced absences than was Precision.

Member Devaney agrees with his colleagues that the Respondent's screening procedures for recalled strikers were not unlawful. Thus, he finds it unnecessary to reach the issue of whether the charge was barred by Sec. 10(b).

APPENDIX B

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in United Steelworkers of America, AFL-CIO, or any other labor organization, by disqualifying for reinstatement Richard Adams, Roger Kline, Dan Hunker, John Maxwell, David Vasil, Nelson Zapata, Marlynn Hunt, and Michael Loupe, on the basis that they were deemed by us on the basis of insufficient information to have obtained comparable employment nor by disqualifying for reinstatement Dan Hunker and Jeanne Wilson because we deemed them to have refused reinstatement with us to substantially equivalent jobs that they held prior to striking, nor those strikers displaced by contract labor and by a temporary employee who were performing bargaining unit work when qualified unreinstated strikers were available.

WE WILL NOT send an application of new employment to John Maxwell or any other unreinstated striker, after he or she has made an unconditional offer to return to work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore Richard Adams, Roger Kline, Dan Hunker, John Maxwell, David Vasil, Nelson Zapata,

Marlynn Hunt, Michael Loupe, Jeanne Wilson, and any other unreinstated striker who, at the compliance stage of this proceeding, are discovered to have been denied reinstatement because they were displaced by contract labor or by a temporary employee who were performing bargaining unit work, to their former positions on the Respondent's preferential recall list, and if they are entitled to reinstatement, offer them immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits as a result of the discrimination against them, less any net interim earnings, plus interest.

OREGON STEEL MILLS, INC.

Scott F. Burson, Esq. and George I. Hamano, Esq., for the General Counsel.

Wayne D. Landsverk, Esq. (Newcomb, Sabin, Schwartz & Landsverk), of Portland, Oregon, for the Respondent.

Don W. Willner, Esqs. and Rosemarie Cordello, Esq. (Don S. Willner & Associates), of Portland, Oregon, for the Charging Party.

Dennis J. Sousa, Esq., for the Individual Charging Parties.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Portland, Oregon, on March 7, 8, 14, and 15, 1989,¹ pursuant to a second amended consolidated complaint issued by the Regional Director for the National Labor Relations Board for Region 19 on February 8, 1989, and which is based upon charges filed by United Steelworkers of America, AFL-CIO (Union), and by attorney Dennis Sousa (Case 36-CA-5945) (Sousa), on June 13 (Case 36-CA-5844), on October 12 (Case 36-CA-5940), on October 14 (Case 36-CA-5945), and on November 15 (Case 36-CA-5968). The complaint alleges that Oregon Steel Mills, Inc. (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

(1) Subsequent to the Union unconditionally offering, on behalf of Respondent's striking employees, to return to work, whether Respondent unlawfully removed certain employees from the preferential rehire list, without offering to reinstate them, or without their having found comparable employment elsewhere.

(2) Under the same conditions specified above, whether Respondent unlawfully employed temporary employees for jobs that one or more persons on the preferential rehire list were qualified to perform, without first offering the jobs to persons on the list.

(3) Under the same conditions specified above, whether Respondent unlawfully required returning strikers, as a condition of being placed on or remaining on the preferential rehire list, to take a physical exam, to take a drug or alcohol abuse test, and to complete a new application process.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel, Charging Party Union, Charging Party Sousa, and Respondent.²

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a Delaware corporation engaged in the steel manufacturing business and having a plant located in Portland, Oregon. It further admits that during the past year, which period is representative of all times material, in the course and conduct of its business, it has sold, and shipped goods, or provided services from its facilities within the State of Oregon, to customers outside the State of Oregon, or sold, and shipped goods or provided services to customers within the State, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value of in excess of \$50,000.

It further admits that during the past year, in the course, and conduct of its business operations, Respondent purchased and caused to be transferred and delivered to its facilities within the State of Oregon goods and materials valued at in excess of \$50,000 directly from sources outside said State, or from suppliers within said State which in turn obtained such goods, and materials directly from sources outside said State.

It further admits that during the past year, in the course and conduct of its business operations, it had gross sales of goods, and services valued in excess of \$500,000.

Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that United Steelworkers of America, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Between late 1980 and September 1983, Respondent was a party to two collective-bargaining agreements with locals of the Union; the first, with Local 6380, covered all office and plant clericals, chemists, and laboratory employees (G.C. Exh. 2a); the second, with Local 3010, covered all maintenance and production employees (G.C. Exh. 2b).

On or about September 9, 1983, Respondent's bargaining unit employees went on strike. Including supervisors and

¹ All dates refer to 1988 unless otherwise indicated.

² The briefs in this case were so professional, comprehensive, thorough, and persuasive, that this fact should be noted for the record.

managers, Respondent's prestrike employment was approximately 650 employees, of which approximately 418 participated in the strike.

On or about June 26, 1984, the Union made an unconditional offer to return to work to their former or substantially equivalent positions. In January 1985, the Union was decertified as collective-bargaining representative of employees in each unit. Subsequently some strikers returned to work and some did not. According to figures compiled by Respondent, 114 (27 percent) returned to work during the strike; 112 (27 percent) have been recalled since the strike; 51 (12 percent) quit, retired, or died without returning to work; 62 (15 percent) declined recall; 47 (11 percent) chose to waive their preferential recall rights for a sum computed on the basis of \$250 per year of service; 8 allegedly have found comparable work; 2 are disqualified to return to work because they engaged in strike violence; 10 cannot be located or contacted; 4 have not responded to correspondence; 6 are allegedly disqualified for medical reasons and 2 are in the process of medical evaluation (G.C. Exh. 4).

The preferential rehiring list (the *Laidlaw*³ list), prepared by Respondent and reflecting the status of strikers as of December 13, 1987, has been received into evidence (G.C. Exh. 3, pp. 1-2). This list is published in Appendix A to this decision. Included with the *Laidlaw* list is other information: First, returning strikers who were invited to Respondent's orientation meetings in the fall of 1987, but who either had been recalled prior to December 13, 1987, the date of the *Laidlaw* list, or had refused recall prior to the same date (G.C. Exh. 3, pp. 3-4); next, new employees, hired since December 13, 1987 and including one employee hired as a temporary (G.C. Exh. 3, pp. 5-6).

Between the date of the strike and fall 1987 when Respondent began inviting groups of 20-30 returning strikers to attend orientation meetings,⁴ Respondent had made several major changes in its working conditions. As described by Jack Longbine, for the last 2 months, Respondent's employee development manager, and for several years prior to that, Respondent's employee relations manager, these changes included downsizing Respondent's work force to about 500 employees, so that currently two employees are performing the work which three used to do. (At the present time, Respondent is in the process of increasing its work force.) In addition, those employees now working have been cross-trained to perform a variety of tasks, not merely those for which they were initially hired. Other changes involve the ownership of the business—employees now own Respondent, and employee compensation—all employees are on salary and eligible for profit sharing. Computers have also been installed wherever possible to increase Respondent's efficiency. According to Longbine, the changes described above have led to increased communication between employees and supervisors and overall greater efficiency.

Finally, Respondent expanded a concept which before the strike had been used only sparingly. I refer to the use of joint management-employee teams in the areas of quality improvement, plant safety, and employee assistance. The employee

assistance committee in particular evolved into a body which presented an issue for the returning strikers.

According to Longbine, an employee assistance committee was formed in late 1980 as a joint union-management committee. The purpose of the committee was to make recommendations to management regarding drug and alcohol abuse and to assist individual employees who had a problem. After the strike began, the committee became a management/nonmanagement committee. Ultimately, it became the employee assistant committee with a commitment to a drug-free working environment. Membership is voluntary and ranges from 12-13 members.

To achieve its goal, the committee recommended in 1986 that a mandatory urinalysis for drug and alcohol abuse be instituted.⁵ Testing began in January 1987 and was required for all new hires and for all employees who, for whatever reason, had been away from Respondent's employ for 6 months or longer. Employees who worked during the strike or had returned to work during the strike were required to take the test only if there was particularized suspicion as determined by the observations of supervisors specially trained to observe certain tell-tale behavior which might indicate an employee was abusing drugs or alcohol.

Respondent also decided that those employees who were required to take the drug and alcohol urinalysis should be required to take a comprehensive physical exam, which includes x-rays, pulmonary function, a blood workup, and strength and agility tests. Since 1979 and possibly before that, Respondent had required all new hires to take the same physical exam.

In addition to the tests required for new hires, Respondent maintains a limited medical testing program for all current employees: All must take an annual test for high blood pressure; as required by U.S. Department of Transportation regulations, all truckdrivers must take an annual physical examination; depending on job, certain categories of employees are required to take annual vision, hearing, or blood analysis tests. However, the comprehensive physical examination or the drug and alcohol urinalysis is required for current employees only when there is reason to believe that a physical impediment may be affecting the person's job performance.

Between mid-1985 through January 1987, Respondent's work force was frozen and little or no hiring occurred. By fall of 1987, Respondent anticipated 25 openings primarily in the melt shop. Approximately 100 persons were on the *Laidlaw* list at this time (G.C. Exh. 3). Accordingly, as noted above, a series of orientation meetings was begun. During the meetings the changes in working conditions, as described above, were explained. For those desiring to be considered for recall, it was further explained that they were required to fill out a work history form for the period following the strike, complete a medical history form, undergo a urinalysis either immediately after the orientation meeting or sometime later, complete a physical exam, and submit to an interview with Lon Southard.

Southard, a management consultant, was retained by Respondent, to assist in identifying persons on the *Laidlaw* list, who might be suited to Respondent's current environment (Tr. 202). Southard was told that Respondent's current work

³The case of *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920, is the lead authority establishing the recall rights of economic strikers. I will return to *Laidlaw* in the Analysis and Conclusion section of this decision.

⁴A few smaller orientation meetings had been held prior to the fall.

⁵In addition to the urinalysis, Respondent also periodically brings in a drug-sniffing dog, brings in outside counselors to address employees, and takes other measures to keep drugs out of the workplace (Tr. 162).

environment no longer had job boundaries, had increased communication, and had employee ownership (Tr. 107). Among the areas explored by Southard was the interviewee's tendencies toward safety, toward working by himself or working with others, and the person's need for supervision, either a little or a lot (Tr. 203–204). In addition, Southard reviewed the person's work history from 1983 to the time of interview. If a person lacked a work history for this period, Southard attempted to determine whether he acquired any new skills.

B. Analysis and Conclusions

1. Earlier litigation

The strike described above resulted in earlier litigation, *Oregon Steel Mills*, 291 NLRB 185 (1988). In that case, the Board affirmed the administrative law judge's findings that while Respondent was not required to recall strikers by seniority, Respondent nevertheless unlawfully failed to offer unreinstated strikers an opportunity to bid on job vacancies until after nonstrikers and strike replacements had failed to bid on the jobs. In reaching its decision, the Board relied on some of the same authorities which will govern resolution of the instant case. I turn to consider these and other authorities.

2. Basic principles of law

In *SKS Die Casting & Machining*, 294 NLRB 372, 375 (1989), the Board stated the following relevant principles of law.

In *Zapex Corp.*, 235 NLRB 1237 (1978), enfd. 621 F.2d 328 (9th Cir. 1980), a case in which the respondent violated Section 8(a)(3) by failing to reinstate economic strikers following their unconditional offer to return to work, the Board stated:

Certain principles governing the reinstatement rights of economic strikers are by now well settled. In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967), the Supreme Court held that if, after conclusion of a strike, the employer "refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act. . . . Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. The burden of proving justification is on the employer." The Court in *Fleetwood* relied on its decision in *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967), where it held that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." In reevaluating the rights of economic strikers in light of *Fleetwood* and *Great Dane*, the Board in *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1968), stated that:

The underlying principle in both *Fleetwood* and *Great Dane*, *supra*, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed.

See also *Rockwood & Co.*, 281 NLRB 862, 875 (1986).

In the instant case, as in *SKS Die Casting*, General Counsel established a prima facie case of unlawful discrimination by proving that the economic strikers made an unconditional offer to return to work and that the Respondent failed to reinstate them, thereby presumptively discouraging the exercise of their rights under the Act. Unlike the Respondent in *SKS Die Casting*, Respondent here contends that its failure to offer reinstatement was due to "legitimate and substantial business justifications," and other defenses, all of which will be considered in due course.

3. Which strikers, if any, acquired regular and substantial employment elsewhere, and which, if any, were offered substantially equivalent positions by Respondent?⁶

If Respondent can prove that persons who have been on strike acquired regular and substantial employment somewhere else, its obligation to reinstate them ceases. *NLRB v. Fleetwood Trailer Co.*, *supra*, 389 U.S. at 381. In *Little Rock Airmotive*, 182 NLRB 666 (1970), modified 455 F.2d 163 (8th Cir. 1972), the Board stated as follows:

The question of what constitutes regular and substantially equivalent employment cannot be determined by a mechanistic application of the literal language of the statute, but must be determined on an *ad hoc* basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned. Without attempting to set hard and fast guidelines, we simply note that such factors as fringe benefits, (retirement, health, seniority for purposes of vacation, retention and promotion), location and distance between the location of the job and an employee's home, differences in working conditions, et cetera, may prompt an employee to seek to return to his old job.

See also *Salinas Valley Ford Sales*, 279 NLRB 679 (1986).

To resolve the question of comparable work as it affects certain employees, I turn to the record.

On April 15, Respondent sent letters to former strikers Richard Adams, Roger Kline, Dan Hunker, John Maxwell, David Vasil, Nelson Zapata, Marlynn Hunt, and Michael Loupe indicating that in Respondent's view, these persons found "stable employment comparable to the work performed at Oregon Steel Mills and that therefore Respondent is no longer legally obligated to give the person preference for future job openings." (G.C. Exhs. 6, 5a, 11, 15, 16, 12, 13, and 7.)

⁶Unreinstated striker John Gigoux was dropped from the case by General Counsel on the grounds that any alleged violation was outside the 10(b) period. After the General Counsel's motion and its effect were carefully explained to Gigoux during the hearing, he stated that he agreed with the motion (Tr. 335–339).

a. *Richard Adams*

Between 1974–1983, Adams worked for Respondent as a maintenance welder making about \$13 per hour. Poststrike, Adams had a series of construction jobs of varying duration. Some of these jobs were in Alaska and California. Most had no fringe benefits and required Adams to live apart from his wife, his son, age 19 and his daughter, age 15. Although in some cases, Adams earned a larger income at these construction jobs than he did at Respondent, this was offset to a degree by periods of unemployment and the expense of maintaining two residences. Moreover, in his Alaska job, the larger income was based on 12–16 hours of work per day, 7 days per week.

After Adams received the April 15 letter from Longbine finding comparable work, Adams wrote back on April 20 stating as follows:

I have just read the letter stating your (O.S.M) employment needs in the foreseeable future. I find your documentation and work history review faulty, to put it mildly. I have been unemployed for the past seven months.

As far as qualifications, the employment agency that did the initial interview stated to me that I was more than qualified, and that the likelihood [sic] of call back just on that alone.

I feel that my name should be on the top of your list for recall, and feel you owe me first consideration on any job opening. [G.C. Exh. 6, April 20 letter.]

On April 27, Longbine wrote back to Adams stating as follows:

Thank you for your letter of April 20, in which you questioned our assessment that you had obtained comparable work.

Our judgement [sic] was based upon information which you supplied to Mr. Lon Southard, the consultant whom we hired to interview all former strikers who had indicated they were still interested in employment at Oregon Steel Mills.

You indicated to Mr. Southard that from February 1984 to July 1986 you worked as a foreman for Astoria Oil (at \$13.50 per hour); from August 1986 to December 1986 as a General Foreman for National Structures (at \$22.50 per hour); from January 1987 to July 1987 as a Pipe Foreman for Kaiser Steel (at \$15.85 per hour) and from July 1987 to “Present” as a Pipefitter Foreman for Veco Inc. (at \$17.50 per hour). You further indicated that you were “On Leave” from your current position and that your employment goals were to continue as a foreman or general foreman in the pipefitting work. You further stated that you earned \$52,000 the past year and were considering several job offers.

If you feel we have misinterpreted the information you gave Mr. Southard, please contact us.

As stated in our letter of April 15, while we no longer feel we have a legal obligation to give you preference for future job openings, we will consider you along with all other applicants when appropriate openings arise. [G.C. Exh. 6, April 27 letter.]

Adams did not further reply to Longbine but at hearing, he testified that Southard had not accurately reported his statements to Longbine. That is, Adams testified that he told Southard that he desired to continue as a foreman or general foreman only if he could not return to Respondent. Southard, who testified for General Counsel, was not recalled to dispute Adams’ testimony.

Beginning in September 1987 while attending an orientation meeting, Adams clearly conveyed to Respondent that he desired to return. At the meeting, he asked a company official whether it would be helpful to bring in his resume, and he was told any means of conveying to Respondent the knowledge and experience acquired over the last 4 years would help him get a job faster. His conversation with Southard reiterated his desire to return to work. The exchange of letters recited above continued Adams’ unbroken expression of his intent to return. I find beyond any doubt, whatsoever, that Adams did not have comparable work.

b. *Roger Kline*

Between 1970–1983, Kline worked for Respondent as a maintenance utility man. Kline was sent an April 15 comparable employment letter, based on his employment at Rogers Construction Co. as an equipment operator and other employment since the strike (G.C. Exh. 5b). Subsequently, Longbine received information from General Counsel that based on a lack of benefits at Rogers, Kline did not have comparable work (Tr. 642).

On October 15, 1987, however, Kline was injured at Rogers and has been under a doctor’s care up to the present time (G.C. Exh. 5c). Respondent now contends that Kline’s case [and that of Marlynn Hunt and Nelson Zapata] is moot (Br. 14). I do not agree.⁷ I find first no evidence to support Respondent’s initial claim that Kline had comparable work. Therefore, the comparable work letter was unlawful. Next, all agree that currently Kline is not eligible to return to work. Accordingly, he should be treated like any other Respondent employee who, for medical reasons, is unable to perform his job. Whether Kline is required to submit to and pass Respondent’s physical exam will be determined below.

c. *Dan Hunker*

Between August 1973–1983, Hunker worked for Respondent; first in the company stores department and later in payroll doing accounting work. Hunker always worked on the day shift. For a 1-year period before the strike, Hunker was working as a messenger about 51 percent of the time. He also “floated” into accounts payable and accounts receivable. However, his pay was never cut.

Hunker was sent a comparable work letter (G.C. Exh. 11). This was based on Respondent’s judgment that Hunker’s self-employment as a chimney sweep was comparable to the work described above. Employing Hunker, his wife, who answers the phone, does bookkeeping and scheduling and one other employee, this business became full-time after the strike. Prior to the strike, Hunker worked part time, about 10 hours per week on a seasonal basis, since 1979 or 1980. Respondent offered Hunker’s 1986 and 1987 tax returns into evidence (R. Exhs. 2–3). Nothing in these exhibits nor any

⁷ See *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 fn. 2 (4th Cir. 1981).

other evidence regarding Hunker shows that he had obtained comparable work.⁸

Although Respondent characterized this issue as a “gray area” (Tr. 221) while I find it to be clearly not comparable, Respondent nevertheless changed its position and offered Hunker a position which Hunker declined. Accordingly, another issue as to Hunker and one other considered below is whether they were offered substantially equivalent employment. For Hunker, I turn back to the record.

In December, Hunker was offered a position as a store-room clerk, a job he had performed some several years before, when he first started working for Respondent. His salary was less in this job than he was making prestrike, and more importantly, he would have had to rotate shifts, periodically working nights and weekends.⁹ I find that Hunker was not offered substantially equivalent employment to his prestrike job, because he worked straight days before the strike, *Providence Medical Center*, 243 NLRB 714, 744 (1979), and because the jobs are not otherwise equivalent; *Harvey Engineering & Mfg. Corp.*, 270 NLRB 1290, 1292 (1984).

d. John Maxwell

Between October 1969–1983, Maxwell worked for Respondent as a journeyman millwright. After the strike, Maxwell obtained a job at Precision Cast Parts. Based on Respondent’s comparison of that job to Maxwell’s former work for Respondent, Maxwell received a comparable employment letter (G.C. Exh. 15). On September 8, Maxwell requested and was sent an application for new employment.

According to Maxwell, his job at Precision had lower seniority, lower pay and less desirable fringe benefits. Longbine testified that on the basis of an annual wage and benefit survey which he personally makes to ensure Respondent remains competitive, he knows that Precision benefit package is about the same as Respondent’s and Precision’s working conditions are better. That is, the work is cleaner and more climate controlled. Longbine was corroborated by Loren Cogdill, Respondent’s employee relations manager. Between 1985–1988, Cogdill held the same position for Precision. He also added to Longbine’s testimony that Precision was safer, larger, with more opportunities for advancement and more equitable in its job bidding procedures which were based more on merit than on seniority.

Notwithstanding the credible testimony of Longbine and Cogdill, I find for the following reasons, that Maxwell did not have comparable work. First, Maxwell was not performing work of a journeyman millwright; instead, he was performing work more akin to a millwright helper. In addition, Maxwell made \$17 per hour at Respondent versus \$13 per hour at Precision. In addition, Maxwell’s seniority was less and at all times material Maxwell desired to return to Respondent.

In October, Maxwell was terminated by Precision due to excessive sick leave. This in turn was caused by the onset

of depression based on a failed marriage. Given Respondent’s benevolent treatment of its employees who are victimized by drug and alcohol abuse, and given Maxwell’s seniority dating from 1969, it is reasonable to assume that Respondent would have been more tolerant of Maxwell’s absences than was Precision. This is still another reason which supports my finding of no comparable work.

In September, Maxwell heard that Respondent was hiring millwrights. In a telephone conversation, Longbine confirmed this and agreed to and did in fact send Maxwell an application for employment. Accordingly, treating Maxwell as a new employee when he was entitled to reinstatement rights under the *Laidlaw* list violates Section 8(a)(1) of the Act. *Pepsi-Cola Bottling Co. of Topeka*, 227 NLRB 1959, 1904 (1977), *enfd.* in part 613 F.2d 267 (10th Cir. 1980).¹⁰

In conclusion, I note that Maxwell appeared at the hearing wearing a neck brace for injuries resulting from an auto accident in February 1989. He conceded in his testimony that he was not then physically qualified to perform work as a journeyman millwright (Tr. 512). He also testified that he expected his physician to release him for work on or about April 21, 1989. Like Kline, Maxwell should be treated like any other Respondent employee who, for medical reasons, is unable to perform his job. Whether he will be required to undergo Respondent’s physical exams will be decided below.

e. David Vasil

Between May 1978–1983, Vasil worked for Respondent as an electrician. In July 1986, Vasil was employed as an electrician with the Bonneville Power Administration (BPA), an agency of the U.S. Government. Currently, Vasil is classified as career conditional, which lasts for 3 years and leads to permanent status expected in July 1990.

As a BPA employee, Vasil travels 100 percent of the time in the States of Oregon, Washington, Idaho, and Montana. Although he works 5 days a week, most weekends are spent in a motel away from the city of Portland. On those few occasions when he returns to Portland, he stays with a relative.

At Respondent, Vasil worked on the swing shift which he prefers over straight days because he was able to attend to a part-time business. Salary and benefits, other than seniority, are roughly equivalent between Vasil’s current job at BPA and his former job at Respondent.

According to Longbine, he decided Vasil had comparable employment, because at Respondent, Vasil was a junior electrician in the maintenance department with limited job bid opportunities. As part of his job at Respondent, Vasil was exposed to dust, heat, and noise, whereas at BPA, Vasil works in the outdoors.

I find that Vasil did not have comparable employment. His BPA job calls for continuous travel which is not expected to change in the future. The limited opportunities to socialize with friends and relatives including a 19-year-old son is evident. Moreover, Vasil has always desired to return to Respondent.

⁸Besides the stark contrast between Hunker’s work for Respondent and his self-employment, I also note in the latter, his income was less, he had no fringe benefits, and his hours were irregular. Furthermore, Hunker credibly testified that he told Southard that he wanted to return to Respondent.

⁹Contrary to General Counsel’s assertion at p. 25 and fn. 14 of the brief, Hunker made it clear in his testimony that his objection to working on Sunday was not based on his religious beliefs (Tr. 244).

¹⁰In a colloquy reported at p. 59 of the transcript, Respondent was placed on notice that General Counsel was contending that the sending of the application for employment to Maxwell was a violation of the Act.

f. *Nelson Zapata*

Prestrike, Zapata, who did not testify, had been a maintenance welder. The record shows he received an April 15 comparable work letter (G.C. Exh. 12). The parties entered into a stipulation which reads as follows:

The Respondent, Oregon Steel Mills, removed Nelson Zapata from the *Laidlaw* list in April, 1988, for alleged comparable work. Upon further investigation, Oregon Steel determined that the alleged comparable work was not comparable to the job Zapata had with Respondent before the strike. Therefore, in January, 1989, Respondent changed its decision concerning Zapata and placed Zapata back on the *Laidlaw* preferential hiring list. Zapata was then offered a job back with Respondent as a welder, which he now is working at. [Tr. 423.]

Here again, Respondent changed its mind after the NLRB intervened and Respondent investigated further. I find that Zapata did not have comparable work and Respondent's change of position appears to concede this finding.

g. *Marlynn Hunt*

Prestrike, Hunt worked for Respondent in the storeroom, purchasing department, data entry, switchboard, and messenger. In May 1985, she relocated from Portland to Seattle where she went to work for Darigold Co. There, Hunt was a mailroom and office clerk, relief switchboard clerk, purchasing order typist, and delivery and pickup person.

At Respondent, Hunt was making close to \$2000 a month while at Darigold she was making close to \$1600 month. Moreover, in Seattle, she found the cost of living higher. When Hunt received the April 15 comparable work letter (G.C. Exh. 13), she immediately (on April 17) wrote back as follows:

In reference to your letter of April 15 concerning your "review" of your records concerning my employment history, I respectfully submit that you must have made a mistake when reading my records.

If you could take time out of your busy day to actually "read" my file, you would see that I am *not* employed. Not only am I not employed, I haven't been employed comparably since September 1983, and I haven't worked since June 1987.

With this understanding having been cleared up, your point of OSM not being "legally" obligated to give me preference for rehiring is moot.

I fully expect to be contacted further if you have any questions or have a need for a fully trained and qualified person. [G.C. Exh. 13.]

On April 27, Longbine wrote back to Hunt explaining that Respondent's decision of comparable work had been based primarily on what she had allegedly told Southard. On July 26, Hunt again wrote back to Longbine. That letter reads as follows:

It has come to my attention that you have numerous job openings available now or in the near future. I hereby wish to state my desire for recall at Oregon Steel Mills.

I understand the temporary in Purchasing is quitting, Roz Zable at Switchboard has quit, Bruce Hunt, Leo Ericksen of Storeroom has bid to other jobs, Ken Uphoff and Milton Leicht retiring. As we all know I had experience in all of the above and had an excellent job performance standing in all. I am interested in all of the above positions as well as any other job openings that become available.

I've been informed you have rehired Sue Cater for one of the Storeroom positions. I wish her the best and congratulate her on rehire. Additionally, I have been informed, that her present job is being paid at a comparable wage as to what she will be making at Oregon Steel Mills.

There seems to be a misunderstanding about certain benefits I had while working at Darigold, Inc. The automobile you referred to in my meeting with Lon Southard, was used only on the job. It was the same situation as the messenger truck.

I do hope to hear from you very soon letting me know when we can schedule the examination for rehire.

I always enjoyed working at O.S.M. and look forward to being there again in the very near future. [G.C. Exh. 13.]

Subsequent to receipt of Hunt's July 26 letter, Respondent investigated further and found that it was mistaken about the availability of a company car. Because Hunt did not have full-time use of the car as Respondent thought, Respondent reinstated Hunt to the *Laidlaw* list and offered her a position in October to plant records which she accepted.

Once Respondent conceded its mistake and in response to Hunt's offer to accept any available position, even a nonbargaining unit position, Respondent moved quickly to see what jobs were available. The plant records position which Hunt initially accepted had been a bargaining unit position. According to Longbine, there had not been any new hires off the street in that department.

After Hunt was on her new job for about 2 weeks, her supervisor reported to Longbine that Hunt was not working out. According to Longbine, Respondent allowed Hunt to switch to a job as a shipping clerk at about the same pay as the other job. Since that job switch, Hunt has worked out well without any additional problems.

When Hunt was allowed to switch jobs, Longbine told her that if she had been a new hire, she would have been terminated after not working out on the first job. However, because she had worked for Respondent before the strike, Longbine told her that Respondent had a sense of obligation to her. Notwithstanding this treatment, Longbine also testified that he was not certain whether Hunt was recalled as a preferential hire or not, but that she was in fact treated as a preferential recall, rather than as a new hire.

I find that Hunt did not have comparable employment at Darigold Co.

h. *Michael Loupe*

Prestrike, Loupe worked for Respondent as a grinder and as a utilityman. In June 1984, Loupe began working for Schnitzer Co. as an equipment operator. Based on his work there, Longbine decided that Loupe had comparable work (G.C. Exh. 7).

Schnitzer is located only about one-half mile from Respondent and in general engages in similar work. Although Longbine testified that the pay and benefits were comparable, I find some significant differences in Loupe's case. Loupe has lower seniority at Schnitzer and limited potential for advancement because the average age of employees holding higher rated jobs is 38 to 40, about the same age as Loupe. He gets a week less vacation at Schnitzer.

As to working conditions, Loupe must work outside 100 percent of the time while at Respondent much of his work was indoors. Consequently, he is sick more often now, and the economic consequences at Schnitzer are greater, because neither company has paid sick leave. While both jobs were very dirty, at Respondent, Loupe could take a hot shower before returning home, while at Schnitzer there are no shower facilities.

Loupe never talked to Southard, but did fill out an employment history form at the October 1987 orientation meeting. After receiving the April 15 comparable employment letter, he notified Longbine that he would await the decision of the NLRB on the issue of his comparable work.

I find that Loupe did not have comparable work. This conclusion is based on the job difference referred to above, and on Loupe's continuing desire to return to work.

i. Jeanne Wilson

The issue as to Wilson is not whether she had comparable employment poststrike, but whether she was offered an equivalent job by Respondent, which she did not accept.

For the past 4 years, Wilson has worked in the accounts payable department for Ness & Co. Prestrike, Wilson had originally been hired by Respondent in 1978 as a relief clerk, with the potential for shift work. Ultimately, she secured a permanent position in the accounts receivable department balancing invoices, doing bank deposits, and reconciling bank statements. Wilson had worked only the day shift in her job as a relief clerk and as an accounts receivable clerk. However, in both jobs, she had periodically been placed on layoff status of varying lengths. The last period of unemployment began in May 1982 when she took maternity leave, which was followed in July 1982 by layoff, which lasted to the strike.

In October 1987 Wilson attended an orientation meeting where she told Longbine that she desired any kind of work with Respondent. She was first offered a job in the melt shop which all agree was not equivalent to the clerical work she had done before. Since the job required rotating shifts, she turned it down and her position on the *Laidlaw* list was not affected. Subsequently, in January, Wilson was offered a position as a stores clerk which again required rotating shifts. Again she turned the job down for that reason. When Longbine told her that in his opinion, by turning down the stores clerk job she would forfeit her place on the *Laidlaw* list, she thought about the offer again, but arrived at the same conclusion.

The job offered to Wilson was equivalent to her prestrike job in all particulars except for the rotating shift aspect of the job. As noted with respect to Hunker, offers of work on a different shift are not substantially equivalent. *Rockwood & Co.*, supra, 281 NLRB at. Here although Wilson may have been hired as a relief clerk, I find at some time prior to the strike, she became a permanent clerical and never worked

any shift other than the day shift. Accordingly, I find Wilson's removal from the *Laidlaw* list and termination to have been unlawful.

In sum, I find that Respondent violated Section 8(a)(1) and (3) of the Act by removing from the *Laidlaw* list, for alleged comparable employment Adams, Kline, Hunker, Maxwell, Vasil, Zapata, Hunt, and Loupe. See *Lone Star Industries*, 279 NLRB 550, 553-554 (1986), aff'd. in part 813 F.2d 472 (D.C. Cir. 1987). After charges had been filed with the Board, Respondent changed its position with respect to Kline, Zapata, Hunker, and Hunt. I leave to compliance to ascertain the effect, if any, of Respondent's change of position.¹¹

I also find that because Respondent did not offer Hunker and Wilson equivalent employment, their subsequent removal from the *Laidlaw* list and termination of recall rights violated Section 8(a)(1) and (3) of the Act.

4. Did Respondent discriminate against returning strikers by its use of screening procedures including employment and medical histories, physical exams, and drug and alcohol urinalysis?

a. The 10(b) issue

On the third day of hearing, Respondent amended its answer to place Section 10(b) of the Act in issue. In addition, the parties stipulated that the 10(b) period would not commence any earlier than December 13, 1987 (Tr. 7, 562). As noted in the introduction to this case, the first charge was filed on June 13 by the Union. In its brief, pages. 15-16, Respondent contends that General Counsel is barred from challenging Respondent's screening procedures by Section 10(b) of the Act.

For two reasons, Respondent's contention is without merit. First, I agree with General Counsel, brief page 36, that the relevant date for statute of limitations purposes in cases like this is the date that the employee's preferential recall right is affected. See *Vitronic Division of Penn Corp.*, 239 NLRB 45 fn. 1 (1978); see also *NLRB v. Albritton Engineering Corp.*, 340 F.2d 281, 285 (5th Cir. 1965). Accordingly, for both Cox and Morris, the earliest date they learned that their reinstatement rights were affected is April 15, when they were informed by letter, of Respondent's insistence on the procedures in issue, as a condition of recall. (See G.C. Exhs. 8, 14.) This date is well within the 10(b) period.

In the alternative, I reject Respondent's argument based on the following analysis: All agree that Respondent has the burden of proof on any affirmative defense including a statute of limitations bar. With respect to the issues in this segment of the case, the evidence is abundant that Respondent's screening procedures were disclosed to returning strikers at the orientation meetings held in October and November. Indeed Adams testified he learned of the drug and alcohol test in late September (Tr. 515). Southland performed his interviews in October and November (G.C. Exh. 20). However, this is not the end of the inquiry.

The proper test for the 10(b) bar is stated in the earlier *Oregon Steel Mills* case, supra, 291 NLRB 185 at 192:

¹¹ See *Southwestern Steel & Supply*, 276 NLRB 1569 fn. 1 (1985).

[S]ection 10(b) does not bar any allegation which was not within the knowledge of or could not have been discovered by the charging parties with reasonable diligence. See e.g., *Wisconsin River Valley District Council*, 211 NLRB 222, 227 (1974).

The Charging Party Union had been decertified in January 1985. There is no evidence that the Union was made a party to the orientation meeting or to the recall procedures herein challenged. More to the point, as stated by General Counsel, brief, page 36, "there is no proof that the Union knew of the implementation of Respondent's policies six months prior to the filing of the charges in this case." Indeed, Respondent does not claim to the contrary. Instead, it merely concludes, brief, p. 16, "Charging parties knew in the fall of 1987, at the latest, that the processing procedures would be required and yet did not challenge them for more than six months." I conclude that Respondent has failed to satisfy its burden of proof and find that Section 10(b) of the Act does not bar consideration of the charges on the merits.

b. Respondent's screening procedures

As noted above, since January 1987, it has been Respondent's policy that all employees off work or away from work for 6 months or longer, are required to take a physical exam, and a separate drug and alcohol urinalysis before returning to work. In addition, returning strikers were required to prepare a medical history form to assist the examining physician in evaluating data and applying it to a specific job to which a returning striker may be assigned. Some of these jobs involve heavy lifting or are otherwise physically demanding. Accordingly, a medical history assists the physician in making recommendations to Longbine as to whether a returning striker is physically qualified for a particular job. Finally, for two reasons, returning strikers were also required to complete a work history form.¹² This form also assisted the examining physician in interpreting the medical data from the physical examination. In addition, Respondent personnel used this form to decide whether a returning striker had developed any new qualifications or skills since last employed at Respondent.

In deciding whether Respondent violated the Act with respect to the screening procedures in issue, I begin with the recent case of *Aztec Bus Lines*, 289 NLRB 1021, 1025-1026 (1988). There, the Board held that physical examinations at the respondent's expense, required for all employees off work for more than 3 months did not discriminate against returning strikers who had been off work for more than 3 months. Similarly, the Board approved the company's rule that those needing physical examinations must also supply an updated Department of Motor Vehicle printout of his or her driving record and that any employee off work for more than 30 days take tests to be requalified on equipment for which he or she was qualified prior to the time off. Based on *Aztec Bus Lines*, I find that the processing procedures in issue in the instant case do not unlawfully discriminate against the returning strikers or treat them as if they were new employees, because they apply to all employees off work for 6 months

or longer. While the work and medical history forms in this case may be limited to returning strikers, their effect is to assist the examining physician to perform a more thorough physical examination and are approved for that reason.

I should note that the processing procedures in *Aztec* were implemented at a time when the Respondent was operating with replacements or nonstriking employees, while the processing procedures in the instant case were implemented in January 1987, after the Union had made its unconditional offer to return to work. Yet, in my judgment, this fact does not distinguish *Aztec* from the instant case. January 1987 represented the end of a 2-year job freeze during which little or no hiring was occurring. It was to be over 9 months longer before significant numbers of new jobs became available. During this period, Respondent applied its physical examination and drug and alcohol urinalysis to all persons off work for 6 months or longer. The Board's discussion at 1025-1026 of the *Aztec Bus Lines* decision and its citation of *Lone Star Industries*, 279 NLRB 250 (1986), *affd.* in part and vacated in part 813 F.2d 472 (D.C. Cir. 1987), convinces me that *Aztec* cannot be properly distinguished from the instant case.

In its brief, page 29, General Counsel concedes that under *Aztec Bus Lines*, Respondent has not committed per se violations of the Act. Yet General Counsel further contends that the processing procedures, as applied in this case, violate the Act. To discuss this argument, I recite that portion of the decision in *Aztec Bus Lines* relied on by General Counsel. It reads as follows at 1026:

Of course, if it is shown that an ostensibly across-the-board policy in fact discriminates against strikers in a significant way and the employer has no counterbalancing substantial business justification, we will find a violation of Section 8(a)(3) under the theory of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). Thus, in *Lone Star*, the Board found a violation in the employer's new policy of totally eliminating seniority as a basis for assigning work, including overtime. The policy economically injured the strikers, nearly all whom had longer time on the job than any of the replacement employees, and the respondent failed to put on any business justification defense at all for the policy. Under those circumstances, an inference of antiunion motive was permissible. Here, however, the General Counsel has not adduced evidence showing that the conditions in question would significantly disadvantage strikers in comparison with replacements or nonstrikers, and given the evidence of nondiscriminatory business purposes served by the requirements—considerations of safety and completeness of personnel information—we cannot conclude that the balance under *Great Dane* is properly struck so as to permit an inference of discriminatory motive.

With the Board's admonition in mind as excerpted above from *Aztec Bus Lines*, I find, for the following reasons, that the processing procedures here did not violate the Act as applied.

First, Respondent's business requires heavy and physically demanding work by many of its employees. Although the ages and physical conditions of the returning striker wit-

¹² Although not crystal clear, it appears that only the *Laidlaw* list employees were required to complete the work history form (Tr. 90); as to the medical history form, the record is silent as to whether other returning employees besides returning strikers needed to complete the form.

nesses called in the instant case do not, with one exception, appear of record, most were males who appeared to be in their 40's and 50's with varying degrees of apparent fitness or lack thereof. I accept Respondent's argument that it has a legitimate business interest in ascertaining whether any returning strikers constitute a safety hazard to themselves, to others, or to plant equipment.

Next, Respondent called as its witness David Murphy, M.D., who performs the physical examinations under contract with Respondent, at the Health Link Occupational Medical Center in Portland. Dr. Murphy explained his experience with changing physical conditions of individuals over the course of 5-6 years, which makes a physical examination worthwhile. Dr. Murphy also made it clear that he was not the company doctor, but rather an independent physician exercising an important function for which he was fully qualified by training and experience. To better perform his job, he even visited the plant on a walk-through basis. All expenses in connection with Dr. Murphy's physical examination, costing over \$200 per exam, are paid for by the Company. Many infirmities discovered such as high blood pressure, heart disease, or defective backs, are matters not obvious to the layperson and could lead Respondent to substantial financial consequences for having employees in the work place afflicted with these medical problems. On the other hand, where employees who work on a daily basis develop these medical disabilities, in many cases, they are identifiable by specially trained supervisors.

As to the urinalysis for drug and alcohol abuse, I find that Respondent's commitment to a drug-free work environment is a substantial business justification. I also find that Respondent's system of using specially trained supervisors to detect behavior for employees who have not been off for 6 months or longer is a rational system clearly related to its legitimate interest.

The General Counsel objects to these procedures due to an allegedly disproportionate effect on returning strikers. Assuming without finding this to be so, I find an adequate business justification has been shown. As to General Counsel's argument that Respondent's commitment to a drug-free workplace is suspect because the contract employees do not need to take these tests, I note the following. Since Respondent does not pay salary or fringe benefits to contract employees, the financial consequences of an injured or drug-impaired contract employee is substantially less than for a similarly afflicted permanent employee. Next, the contract employees generally work on short jobs between 1-4 weeks in most cases, so Respondent's exposure to contract employee mischief is limited. Also, it is possible that they are screened by their employers, the contracting agencies.

When an employee either refuses to undergo the processing procedures, or is determined to be physically disqualified, he or she is removed from the *Laidlaw* list and placed in an "on hold" category. There the person waits with "the ball in his court" as described by Longbine. If his condition is temporary or treatable, he can be reexamined when his disqualifying condition ends. For those unable to pass the urinalysis, they are counseled and offered treatment until they are drug-free.

In conclusion, I note the testimony of two General Counsel witnesses who are currently off the *Laidlaw* list and "on hold" due to their objections to the processing procedures.

Don Morris, age 58, and Respondent employee since 1955, gave testimony that was contradictory, confusing and inconsistent. In the course of his testimony, he first objected to taking a urinalysis and physical, then during questioning by Attorney Sousa, he didn't object, then under cross-examination, he objected, but had "no problem" with a physical, and finally under questioning by me, Morris testified he would take both a physical and urinalysis without objection.

A second witness was named George Cox, a Respondent employee since 1959. Longbine had testified that on one occasion in February, Cox came to the office and behaved in a disorderly manner, appearing to be intoxicated. At this time Cox also referred to a fellow employee, who was not present, by a racially derogatory name. His demeanor on the stand entirely corroborated this description and on one occasion I had to caution Cox to behave himself (Tr. 432).

Both Morris and Cox presented in their testimony and demeanor prima facie evidence questioning their fitness to return to work. I find that Respondent's nondiscriminatory processing procedures are designed to resolve questions presented by Morris and Cox, and others for whom no questions are raised save their absence from the workplace for 6 months or longer. Based on the above analysis and the case of *Aztec Bus Lines*, I will recommend to the Board that this segment of the case be dismissed.

5. Is Respondent discriminating against returning strikers by the extensive use of contract labor?

As noted above, prestrike Respondent's nonsupervisory employees were grouped into two bargaining units, one for clericals and one for production and maintenance. Only rarely were contract labor or temporary employees used prior to September 1983 when the strike began. During the prestrike years and poststrike as well, Respondent found itself with peaks and valleys in its business volume. This led to a recurring system of layoffs and recalls of Respondent's permanent employees. According to Longbine, this cycle affected employee morale and diminished the quality of Respondent's work force.

Longbine was supported in his analysis by Byron Boyles, Ph.D., an industrial psychologist, who testified for Respondent. Employed by a trade association of which Respondent was a member, Dr. Boyles first described the history of using contract labor. He noted that it was important for efficiency reasons to create a stable and confident work force. Accordingly, he testified, it is necessary for employers to create a buffer between the permanent work force and the demands of the moment. This can be done through the use of overtime, cross-training and/or contract labor.

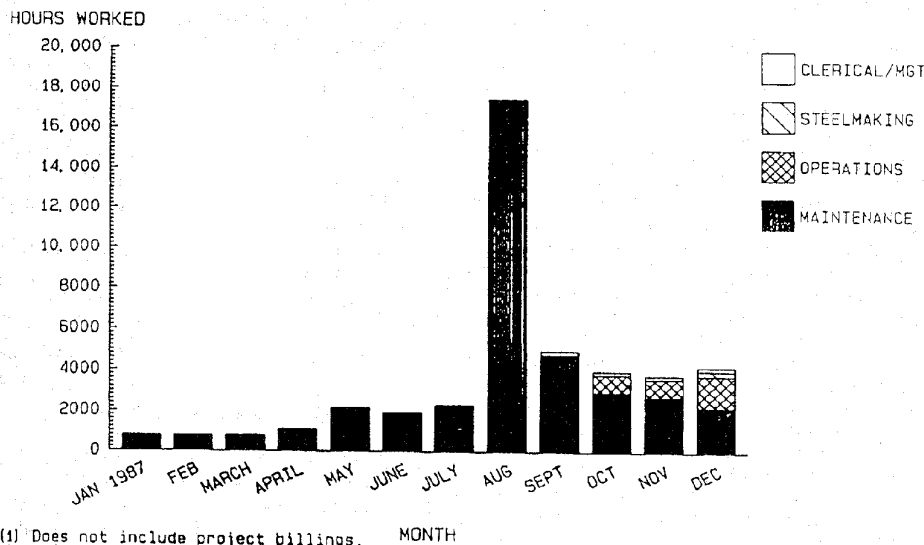
Another Respondent witness who testified regarding the use of contract labor was Robert Sikora, Respondent's vice president of manufacturing. Sikora noted that in 1983-1984 Respondent was noncompetitive and losing money both in the domestic and international market place. He testified that Respondent's production costs were too high. Through the use of contract labor on limited jobs, he testified to a 40-percent savings of on labor costs. This figure is based not so much on wage comparisons which are allegedly comparable between contract labor cost and Respondent's permanent employees' labor cost. Rather it is based on the savings on fringe benefits such as pension, medical, workman's com-

pensation, and other costs which Respondent is not required to pay for its contract labor force.

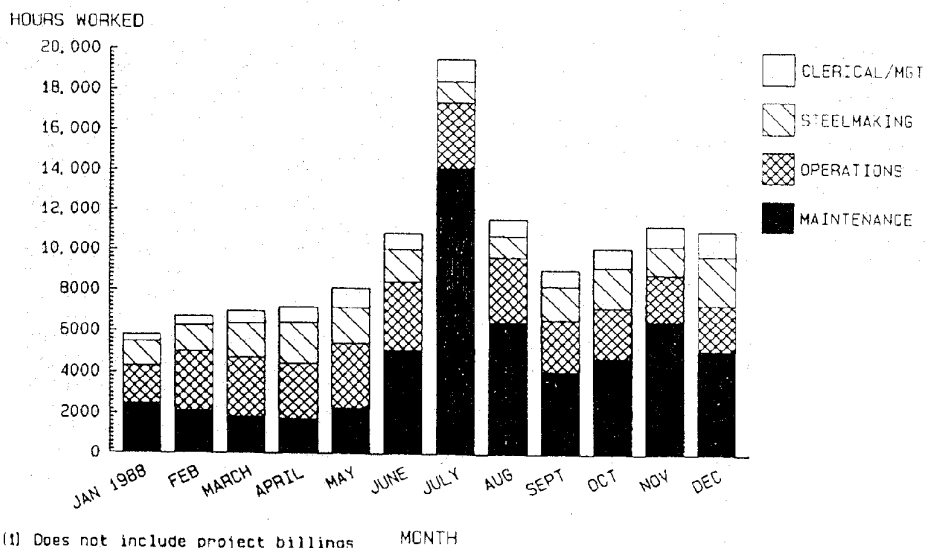
At the present time, contract labor amounts to 5-10 percent of Respondent's work force. They work both in former bargaining unit and nonbargaining unit jobs. Sikora testified

that Respondent is now profitable, is meeting its production goals, and has had no layoffs since 1986. An exhibit reflecting the increasing use of contract labor during the years of 1987 and 1988 was received into evidence:

OREGON STEEL MILLS
1987 OUTSIDE SERVICES
BILLED ON HOURLY BASIS (1)



OREGON STEEL MILLS
1988 OUTSIDE SERVICES
BILLED ON HOURLY BASIS (1)



The sources of the contract labor were primarily from five agencies: Kelly Services for clerical, Allied Electric for maintenance, Cojon, two-thirds maintenance and one-third elsewhere, Handskill for production and E. C. Construction for maintenance.

In late 1988, some contract labor was converted to permanent employee status. Between 6 to 12 employees were converted to permanent status primarily in maintenance and production. According to Longbine, this was done only after qualified labor from the *Laidlaw* list had been exhausted.

Longbine also testified that only one temporary employee, Debbie Olcott, who did not testify, had been hired to perform former bargaining unit work. By temporary employee is meant a person hired directly by Respondent, instead of through a contract agency. Olcott had been a prestrike employee of Respondent who left for some reason. According to Longbine, Olcott was hired on February 25, as either vacation relief or injured employee replacement, stayed for 4 to 8 weeks, and then left Respondent's employ.

In deciding the issue presented, I note that the legal principles are essentially the same as for those returning strikers who allegedly secured comparable employment. In summary of relevant rules: Unless the employer, who gives available jobs to others instead of reinstating strikers, can show that his action was due to legitimate and substantial business justifications, it is guilty of an unfair labor practice. The burden of proving justification is on the employer. *NLRB v. Fleetwood Trailer Co.*, supra, 389 U.S. at 378.

In its brief, page 26, Respondent asserts that in challenging its use of contract labor, General Counsel has not even established a prima facie case. On the contrary, I find that General Counsel has indeed established a prima facie case. The evidence establishes that contract labor and at least a single temporary employee performed bargaining unit work. While some of the jobs were of short duration, many other jobs were much longer. Particular contract employees could be referred to Respondent over and over, performing the same job for up to a year (Tr. 282).

For example, General Counsel called a witness named Bruce Hunt, husband of Marlynn Hunt and reinstated striker as of November 1987. Currently working as a stores clerk, Hunt credibly testified that upon his return to work, he became aware of two persons who were either temporary or contract labor. One individual named Ron Grewell worked as a clerk in the scale house between April to December. The other individual named Art Schanno began working in April and was still employed as of March 8, 1989, the hearing day.

Similar testimony was given by General Counsel witness Charles Grogham, a former striker, reinstated as of May 1987 as a millwright in the maintenance department. He named several persons who were employed for over a year as contract labor in the maintenance department. One or two were even converted to permanent employees after several months of employment, while others eventually left. All were doing bargaining unit work when there were qualified *Laidlaw* people available for recall. Finally, Marlynn Hunt too, observed a temporary or contract employee doing bargaining unit work in the scale house as of October to the present time (Tr. 376-380).

In *Medallion Kitchens*, 277 NLRB 1606 (1986), enf'd. in relevant part 811 F.2d 456 (8th Cir. 1987), the Board affirmed the judge's finding of 8(a)(1) and (3) violations,

where the employer hired temporary employees for work lasting only 2 to 10 weeks to assist in relocating the plant to another area. Based on the length of employment, duties, hours, pay and authority, the Board and the reviewing court held that the employer had a duty to first offer the jobs to the unreinstated strikers.

In finding that General Counsel established a prima facie case, I conclude with two brief points.

First, in light of Sikora's claim that Respondent saves about 40 percent of its labor costs by using contract labor, the question came up on the Union's cross-examination of Sikora, why certain vouchers for contract labor reflected charges to the company two or three times the hourly rate for Respondent's permanent electricians and welders. Sikora answered that he assumed such rates would reflect a short-time job of 32 to 48 hours (Tr. 729). When asked if he were certain that higher contract wages were paid only for short jobs lasting 2 or 3 days, Sikora answered, "I sure as hell would hope so, yes, because obviously, my costs are going to increase if that's not true" (Tr. 729).

Second, Longbine testified as follows (Tr. 323-324):

Q. [Judge Stevenson] As I understand it, you do not go to the *Laidlaw* list for any temporary employees even though there may be qualified people on the *Laidlaw* list for what you're looking for. Is that right?

A. Well, no, we have—if it was—it would depend on how long it was. If it was a couple of weeks, no. If it was several months, at that point we would have looked at the list and made some determination about suitability.

Q. The sole distinguishing factor as to whether the company would go to the *Laidlaw* list or hire a temporary employee then would be the expected tenure of the job. Am I right on that?

A. The expected tenure of the job. What skills are needed to do that job would also come into it.

In light of the credible testimony of Bruce Hunt, Marlynn Hunt, and Charles Grogham, I don't believe Longbine on this point. However even if he were accurate, under *Medallion Kitchens*, his testimony constitutes an admission and contributes to General Counsel's prima facie case.

Finally, none of this deals with the question of whether Respondent has proven a legitimate and substantial business justification as a defense to General Counsel's prima facie case, an issue to which I now turn.

I find that Respondent has not proven its affirmative defense. First, I don't believe Sikora's testimony that fringe benefits paid to permanent employees amount to 40 percent of total labor cost, leading to a 40-percent savings when contract labor is used. Putting aside a few examples where the contract labor agency was paid substantially more for electricians and welders, and Sikora's less than certain explanation for this discrepancy, I also note the failure of Respondent to offer a financial or accounting analysis to show the cost basis for employee fringe benefits. Sikora's mere assertion is not sufficient. If Respondent could save 40 percent on its labor cost by using contract labor, while holding all other factors such as training, experience, morale, and attendance equal, would it make sense that Respondent limits itself to only 5-10 percent of its work force? The answer to this question is evident.

Moreover, Respondent has failed to show a nexus between its use of contract labor and the company's economic health. In other words, in the context of the evidence presented here, there is no showing that Respondent would not be even better off, through the use of its experienced employees returning to work from the *Laidlaw* list, or at least given the choice of returning to work for jobs which in some cases, are of short duration.

As to the buffer between Respondent's permanent work force and the inevitable peaks and valleys, I fail to see how bringing into the workplace contract labor to perform jobs which in some cases may last up to a year or longer, while maintaining on the *Laidlaw* list, a group of experienced unreinstated strikers, contributes to overall high morale and plant efficiency.

Notwithstanding the above analysis, I find in the alternative, that at most Respondent has proven "administrative convenience," which the Board has held does not rise to the level of legitimate and substantial business justification. See *Vitronic Division of Penn Corp.*, 239 NLRB 45, 48 (1978), enf. denied en banc by an evenly divided court 630 F.2d 561 (8th Cir. 1979). Compare *Pillows of California*, 207 NLRB 369 (1973).

For all the reasons stated above, I find that Respondent's use of contract labor and a temporary employee discriminated against those employees on the *Laidlaw* list and therefore violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Oregon Steel Mills, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by discouraging membership in the Union and by restraining and coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act in the following particulars:

a. By disqualifying for reinstatement the following named economic strikers who made unconditional offers to return to work because Respondent deemed them to have obtained comparable employment elsewhere: Richard Adams, Roger Kline, Dan Hunker, John Maxwell, David Vasil, Nelson Zapata, Marlynn Hunt, and Michael Loupe;

b. By disqualifying for reinstatement Dan Hunker and Jeanne Wilson because Respondent deemed them to have refused reinstatement with Respondent to substantially equivalent jobs which they held prior to striking;

c. By sending an application for new employment to John Maxwell after he had made an unconditional offer to return to work;

d. By using contract labor and temporary employees to perform bargaining unit work when qualified employees on the preferential rehire list were available.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Other than specifically found herein, Respondent has committed no other unfair labor practices.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it is recommended that Respondent be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent by disqualifying for reinstatement the following strikers it discriminatorily deemed on the basis of insufficient information to have obtained comparable employment Richard Adams, Roger Kline, Dan Hunker, John Maxwell, David Vasil, Nelson Zapata, Marlynn Hunt, and Michael Loupe; by disqualifying for reinstatement strikers Dan Hunker and Jeanne Wilson because Respondent deemed them to have refused reinstatement to positions substantially equivalent to those held prestrike; and by disqualifying for reinstatement those strikers displaced by contract labor and by a temporary employee who were performing bargaining unit work when qualified unreinstated strikers were available, must make those strikers who would otherwise have been reinstated whole for any loss of earnings and other benefits, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

ORDER

The Respondent, Oregon Steel Mills, Inc., Portland, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disqualifying for reinstatement the following strikers it discriminatorily deemed on the basis of insufficient information to have obtained comparable employment, Richard Adams, Roger Kline, Dan Hunker, John Maxwell, David Vasil, Nelson Zapata, Marlynn Hunt, and Michael Loupe, and by disqualifying for reinstatement strikers Dan Hunker, and Jeanne Wilson, because Respondent deemed them to have refused reinstatement to positions substantially equivalent to those held prestrike and by disqualifying for reinstatement those strikers displaced by contract labor and by a temporary employee who were performing bargaining unit work when qualified unreinstated strikers were available.

(b) Sending an application for new employment to John Maxwell or any other unreinstated striker, after they made an unconditional offer to return to work.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore Richard Adams, Roger Kline, Dan Hunker, John Maxwell, David Vasil, Nelson Zapata, Marlynn Hunt, Michael Loupe, Jeanne Wilson, and any other unreinstated striker who, at the compliance stage of the proceeding, are discovered to have been denied reinstatement because they were displaced by contract labor or by a temporary employee who were performing bargaining unit work, to their former positions on Respondent's preferential recall list, and if they

¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

are entitled to reinstatement, offer them immediate and full reinstatement to their former positions or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Portland, Oregon, copies of the attached notice marked "Appendix B."¹⁴ Copies of the no-

tice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

<i>Name</i>	<i>Recalled</i>	<i>Declined Recall</i>	<i>On Hold</i>	<i>Removed Comp Work</i>	<i>Removed Strike Violence</i>	<i>Unable to Locate</i>	<i>Accepted Length of Service Offer</i>
Adams, Richard				X			
Avery, Alan						X	
Bailey, Odess	X						
Barrett, Eugene	X						
Baxter, Larry							X
Billington, Denis							X
Boyle, Terrence							X
Braich, Milo							X
Briggs, Shawn							X
Brown, Jack			X				
Burlingame, Richard	X						
Buxton, Edgar							X
Byrne, James						X	
Camp, Randall						X	
Carter, Thomas		X					
Cater, Sue	X						
Cox, George			X				
Day, James							X
Dean, Kathy						X	
Dooley, Ivan							X
Eli, Roger							X
Else, James	X						
Erickson, David							X
Fitzgerald, Marlin							X
Geis, Bruce					X		
Gerba, Martin							X
Goforth, Clifford	X						
Gonder, Gary						X	
Hall, Eugene					X		
Hall, Harry							X
Hanson, Frank							X
Hartley, Anthony							X
Hartwell, Vernon							X
Hastay, Dale							X
Hayden, Alfred	X						
Humphrey, Tom							X
Hunker, Dan		X					
Hunt, Marlynn	X						
Ira, Leo							X
Jaeger, Neil							X

¹⁴If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor

Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A—Continued

<i>Name</i>	<i>Recalled</i>	<i>Declined Recall</i>	<i>On Hold</i>	<i>Removed Comp Work</i>	<i>Removed Strike Violence</i>	<i>Unable to Locate</i>	<i>Accepted Length of Service Offer</i>
Keener, Clifford							X
Kline, Roger			X				
Kreitz, Richard							X
LaFollette, Richard	X						
Lambert, Jessie							X
Lambert, Martin						X	
Laverdure, John			X				
Leicht, Milton	X						
Linderman, Kenneth							X
Loupe, Michael				X			
Marino, Stan							X
Marsh, Leo							X
Maxwell, John				X			
May, James		X					
McArdle, Thomas							X
McGahan, Marilyn			X				
McGee, John							X
McIver, Garnet			X				
Mitchell, Charles							X
Miyake, Hayao							X
Moran, John							X
Morilon, Lowell	X						
Morris, Donald			X				
Morris, Robert						X	
Nash, Doris							X
Neal, James							X
Nestor, Warren							X
Noble, Jack							X
Olson, Larry						X	
Olcott, Miriam							X
Powell, Scott	X						
Raabe, Jerrold							X
Ramer, Aaron							X
Rask, Bert	X						
Rea, Raymond	X						
Rice, Hobart						X	
Rohan, Richard							X
Romey, Edward							X
Scholl, Robert							X
Shuck, Glen							X
Slagle, Phil							X
Stachelrodt, Peter							X
Stewart, James							X
Stocker, Ray						X	
Stoneburg, Rohn							X
Tevik, Mike						X	
Totten, Theodore							X
Vasil, David				X			
Vernon, James			X				
Wallace, Timothy	X						
Wallman, James						X	
Whitney, Gary		X					
Wilson, Jeanne		X					
Wright, Dennis							X
Zapata, Nelson	X						